

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 23 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0107-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
BRIAN L. ANDERSON,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007125891001DT

Honorable Larry Grant, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Linda Van Brakel

Phoenix
Attorneys for Respondent

Brian L. Anderson

Buckeye
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Brian Anderson seeks review of the trial court's order summarily dismissing his successive petition for post-conviction relief filed pursuant to Rule 32,

Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Anderson pled guilty in 2007 to theft of a means of transportation, also admitting a previous felony conviction for aggravated driving under the influence, and was sentenced to a 6.5-year prison term. Before initiating the current proceeding, Anderson filed three petitions for post-conviction relief, all of which the trial court summarily denied or dismissed.

¶3 In 2011, Anderson filed a “Motion for Reduction of Time Due to Change in the Law,” arguing that changes to the sentencing statutes made pursuant to H.B. 2207, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, entitled him to a reduced sentence and rendered his plea agreement “unconstitutional.” He also complained that, due to budget constraints, the Arizona Department of Corrections was not providing him with adequate care and protection. The trial court characterized Anderson’s motion as his fourth petition for post-conviction and summarily dismissed it, concluding he had not stated a claim upon which relief could be granted.

¶4 On review, Anderson reurges his claim that, due to changes in Arizona’s sentencing statutes, aggravated driving under the influence is no longer a historical prior felony conviction and, thus, his plea agreement is “unconstitutional” and his sentence must be “correct[ed].”¹ *See* Ariz. R. Crim. P. 32.1(g) (post-conviction relief available if

¹Anderson does not repeat his claim related to prison conditions. To the extent he seeks to raise new claims in his reply to the state’s response to his petition for review, we

“significant change in the law” applicable to “defendant’s case would probably overturn the defendant’s conviction or sentence”). Anderson’s argument is meritless. The 2008 changes to Arizona’s sentencing scheme are not a significant change in the law applicable to Anderson’s sentence because those changes are expressly effective “from and after December 31, 2008,” and were not made retroactive. 2008 Ariz. Sess. Laws, ch. 301, § 120; A.R.S. § 1-244 (“No statute is retroactive unless expressly declared therein.”).

¶5 In any event, even were the changes retroactive, they would not change Anderson’s sentence because, contrary to his argument, under the current statute Anderson’s conviction for aggravated driving under the influence still constitutes an historical prior conviction, and he still would face a presumptive 6.5-year prison sentence. *See* A.R.S. § 13-105(22)(a)(iv) (“[h]istorical prior felony conviction” means “[a]ny prior felony conviction for which the offense of conviction . . . [i]nvolved aggravated driving under the influence of intoxicating liquor or drugs”); A.R.S. § 13-703(B)(2) (defendant “shall be sentenced as a category two repetitive offender if” he “is at least eighteen years of age or has been tried as an adult and stands convicted of a felony and has one historical prior felony conviction”); A.R.S. § 13-703(I) (sentencing range for category two repetitive offender); A.R.S. § 13-1814(D) (designating theft of means of transportation a class three felony).

do not address those claims. *See* Ariz. R. Crim. P. 32.9(c)(2) (“reply shall be limited to matters addressed in the response”).

¶6

Although we grant review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge